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No. 88-2031

In The

Supreme Court of the United States

October Term, 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether sidewalks adjacent to United States Post Office Buildings constitute Public Forums?

II. Whether 39 C.F.R. § 232.1(h), which prohibits solicitation on the sidewalks of United States post offices, is an unconstitutional restriction on the freedom of speech?

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STATEMENT OF THE CASE

Respondents, Marsha Kokinda and Kevin Pearl, are volunteers for the National Democratic Policy Committee (NDPC). The NDPC is a political advocacy group which seeks to inform the public about political, cultural and scientific ideas. These ideas include human welfare concerns such as eliminating Acquired Immune Deficiency Syndrome ("AIDS") and drug abuse from our society.

On August 6, 1986, Respondents set up a table on the sidewalk in front of the Bowie, Maryland post office. They distributed NDPC literature and solicited contributions to their organization. The Court of Appeals described the geography of the Bowie, Maryland post office as follows:

> The sidewalk on which [respondents] set up their table is approximately seven feet wide and is located on postal service property. The sidewalk runs in front of the Bowie post office and postal patrons must use this walkway to enter the building. A post office parking lot is contiguous to the sidewalk and both the parking lot and the post office building itself are set back from a public road. A municipal sidewalk abuts the public road, runs in front of the parking lot, and is parallel to the post office sidewalk.

Kokinda v. United States, 866 F.2d 699, 700 (4th Cir. 1989). The table on the sidewalk was approximately five to six feet from the main entrance to the building.

Petitioner alleged at trial before the United States District Court, that the Bowie, Maryland Post Office received between 40 and 50 complaints from postal patrons about respondents' activities. Petition for Writ of Certiorari at 4. The court of appeals, however, discounted these so-called complaints.

> The record reveals that postal employees received 'forty to fifty' complaints concerning Pearl and Kokinda. [Postal Patron] Wyatt testified that, because she knew the Girl Scouts were not allowed to sell cookies on federal property, she asked a clerk if Kokinda and Pearl's activities were not also illegal. *The record is completely silent as to the nature or focus of the other thirty-nine to forty-nine complaints. For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers.*

Id. at 705 (emphasis added).

There was no evidence submitted to the United States District Court showing that Respondents or their materials were blocking, obstructing or interfering with the entranceway to the building. Nevertheless, on August 6, 1986, a criminal complaint was filed against Respondents. The complaint stated that on August 6, 1986, Respondents solicited signatures and publications for the NDPC on the property of the United States Postal Service ("Postal Service") at Bowie, Maryland in violation of 39 C.F.R. § 232.1(h).

Respondents were convicted at trial before a magistrate and thereafter appealed their conviction to the district court. Respondents asserted before the district court that the prohibition against solicitation as set forth in 39 C.F.R. § 232.1(h) violated their free speech rights as protected by the First Amendment to the Constitution. The district court, however, affirmed Respondents' convictions.

Thereafter, Respondents appealed their convictions to the United States Court of Appeals for the Fourth Circuit. The court of appeals reversed Respondents' convictions, holding that

> [b]ecause we believe that the post office sidewalk constitutes a public forum and that the postal regulation is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values, we hold 39 C.F.R. § 232.1(h) an unconstitutional infringement upon defendants' rights. No significant government interest has been demonstrated that

would be narrowly accommodated by eliminating an entire category of political speech from this public forum. The convictions of these defendants are therefore reversed.

866 F.2d at 700. Petitioner filed a Petition for Rehearing with Suggestion for Rehearing In Banc, which was denied on April 14, 1989. On June 13, 1989, Petitioner filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

1. **The United States Court of Appeals for the Fourth Circuit correctly held that the Post Office sidewalk constitutes a public forum and that the Postal Regulation prohibiting solicitation is an unconstitutional infringement on freedom of speech.**

a. Sidewalks are public forums.

The United States Court of Appeals for the Fourth Circuit correctly concluded that "the post office sidewalk constitutes a public forum and that the postal regulation [prohibiting solicitation] is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values." *Kokinda*, 866 F.2d at 700. The Fourth Circuit's decision is in accord with well-established precedents of this Court.[1]

[1] Respondents call the disputed subject property "sidewalks" as did the Fourth Circuit. Petitioner has studiously avoided using this word in its Petition, preferring the term

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> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515-516 (1939) (opinion of Roberts, J.).

The principle enunciated by Justice Roberts in *Hague* includes sidewalks: "streets, *sidewalks*, and parks, are considered, without more, to be 'public forums' [sic]." *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added); *see also Boos v. Barry*, 108 S. Ct. 1157 (1988) and *Frisby v. Schultz*, 108 S.Ct. 2495 (1988).

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"walkway." Whether a "walkway" or a "sidewalk," however, the disputed subject property is indisputedly a concrete structure extending from the post office building to the post office parking lot. Further, this concrete structure, which Respondents and the Fourth Circuit panel below deemed a "sidewalk," was constructed to facilitate pedestrian traffic just like a municipal sidewalk.

Underlying this merely semantic distinction between the parties is Petitioner's apparent fear that by referring to the disputed subject property as a "sidewalk," the well-established *Hague* formulation for traditional public forum analysis might be unintentionally invoked. Such a development would certainly envelop post office sidewalks in constitutional protections and prevent further absolute bans. Respondents respectfully submit that by granting certiorari, this Court may encourage governmental wordsmiths to fashion new obfuscations with which to frustrate the clear mandates of the Constitution.

In two recent decisions, this Court continued its reasoned application of Justice Roberts' *Hague* formulation. First, in *Boos v. Barry*, 108 S.Ct. 1157 (1988), this Court applied a most exacting standard of scrutiny to a provision of the District of Columbia Code that prohibited certain First Amendment activities on public streets and sidewalks near foreign embassies. *Id.* at 1164. Further, a majority of the Court assented to the plurality opinion's explicit determination that the code provision was applicable to streets and sidewalks – property considered to be traditional public forums even though in the environs of foreign embassies.

Second, in *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), this Court rejected arguments that it disregard "the cliches" about the public forum status of streets, parks and sidewalks in resolving a dispute over speech activities on residential streets. *Id.* at 2499-2500. Although dissenting from the ultimate result in *Frisby*, Justice Brennan nevertheless found the "cliche" argument to be a rogue argument and he wholeheartedly agreed with that portion of the majority opinion which found residential streets to be traditional public forums. *Id.* at 2506 n.1. Indeed *Frisby* and this Court's other

> decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche," but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. C.I.O.*, 307 U.S., at 515, 59 S.Ct., at 964.

Frisby at 2500. The *Frisby* opinion demonstrates the utility of the *Hague* formulation:

> No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.

Id.

Streets, sidewalks and parks are not the only traditional public forum properties. State capitol grounds are public fora for the exercise of free speech. *Edwards v. South Carolina*, 372 U.S. 229 (1963). Similarly, this Court has recognized other, limited public fora, including state fairs, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), school grounds, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and public libraries, *Brown v. Louisiana*, 393 U.S. 131 (1966). The "concept of public forum," to use Professor Kalven's phrase, by its nature can be neither monolithic nor static. Kalven, *The Concept of Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 1.

Petitioner conceded in the Court below that the municipal sidewalk, which abuts the parking lot in front of the Bowie Post Office building, is a public forum. Petitioner asserted in the Court below and in its Petition to this Court, however, that the sidewalk adjacent to the post office building is not a public forum because it is "set back from the street and plainly dedicated to Post Office use." Petitioner at 11. The Fourth Circuit properly rejected Petitioner's assertion. "[T]he fact that the walkway at issue here happens to be located on property owned by the federal postal service does not alone change its public forum character." *Kokinda*, 866 F.2d at 700.

The holding of the Fourth Circuit Court of Appeals was again based on well-established precedents of this Court. "[T]he government [may not] transform the character of [public forum] property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace*, 461 U.S. at 180. *See also United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 133 (1981). Nor should the First Amendment be "consigned to the mercies of architectural chicanery." *Kokinda*, 866 F.2d at 703. The government seeks this Court's approbation of a previously unrecognized executive power. For if an intervening parking lot, separating a municipal sidewalk from a post office sidewalk, relegates protected First Amendment activity to the protections afforded by the standard of review used for speech restrictions in a nonpublic forum, the Government will have obtained by the ink of an architect's pen what the ink of the Founders' quills denied to it: the power to create speech free zones at will.[2]

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[2] Discussing *United States v. Bjerke*, 796 F.2d 643 (3d Cir. 1986), Petitioner summarized that Third Circuit holding as a rejection of a challenge similar to that of Respondents' below

> on the ground that the walkways abutting the post office, which were located "a good distance removed from the street, [and] could not be confused with municipal sidewalks" (796 F.2d at 649), were not traditional public forums "dedicated to serve the traditional functions of streets and parks."

Petition at 14.

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . " U.S. CONST.

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Petitioner's reliance on this Court's holding in *Greer v. Spock*, 424 U.S. 828 (1976) is misplaced. The subject property at dispute in *Greer*, streets and sidewalks aboard a military base, is readily distinguishable from the open sidewalks at issue herein. Aboard Fort Dix, "[m]ilitary police regularly patrol[led] the roads within the reservation, and they occasionally stop[ped] civilians and ask[ed] them the reason for their presence." *Greer*, 424 U.S. at 830. In the instant case, however, there is absolutely no evidence that the sidewalks of the Bowie, Maryland, Post Office are patrolled by postmen or other federal officers or that patrons or others found thereon are interrogated as to the purpose of their presence on the sidewalk. Further, persons driving aboard Fort Dix were warned in advance, by sign postings, that they were subject to search while on the post. *Id.* There is no evidence that such is the case for persons entering the parking lot at the Bowie Post Office. Finally, the main

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amend. I. Under this Court's precedents, that proscription binds the executive and judicial branches of the federal government and not merely the legislative. Indeed, it is only since adoption of the fourteenth amendment and this Court's later jurisprudence thereunder (*Gitlow v. New York*, 268 U.S. 652, 656 (1925); *Stromberg v. California*, 283 U.S. 359 (1931)), that the States have found themselves under the strictures of the first amendment. Petitioner would except from first amendment protection sidewalks otherwise indistinguishable from those of the surrounding municipality on the chimerical basis that federal ownership places the post office sidewalk beyond the reach of the first amendment or, at least make public forum analysis unsuitable. In so doing, Petitioner exalts neither the spirit nor the letter of the first amendment; rather, the government trammels both by its inattentiveness to the mandates of that provision.

entrances to Fort Dix were guarded at least occasionally. *Id.* Petitioner does not assert that it posts guards at the entrances to its parking lots or at the ends of its sidewalks.

Beside the factual differences between *Greer* and the instant case, this Court in *Greer* emphasized the "special constitutional function of the military in our national life, a function both explicit and indispensable." *Id.* at 837. Petitioner strains to find such similar special constitutional functions on which to posit a special rule for post office sidewalks otherwise indistinguishable from the sidewalks of the surrounding municipality. In fact, commentators have noted that post offices in many parts of the country function as the nerve center of the community where everyone meets to socialize and find out what is happening. "Everybody's Office: Bainbridge Post Office Is Key To Towns Activities." POSTAL LIFE MAGAZINE (March/April 1980); Margolis, "In Rural America The Post Office Remains A Mecca," SMITHSONIAN 63-66 (July 1983). Unlike most military posts, the general public has access to postal property including post office sidewalks, 39 C.F.R. § 232.1(b). Furthermore, the general public has access to bulletin boards inside postal buildings to post notices of public concern, such as announcements of public assemblies, elections and judicial sales. 39 C.F.R. §§ 243.2(a), 232.1(h)(1)(ii).

Finally, postal services performed at post offices go far beyond "mail services." United States Savings Bonds, postal money orders and nonpostal stamps are sold at post offices. 39 C.F.R. § 111.5(i)(4). The Postal Service also conducts Housing Vacancy Surveys for the Federal Home Loan Bank Board. 39 C.F.R. 259.1(d)(1). The federal government has chosen to rely entirely on post office lobby

distribution in order to disseminate draft registration program materials. Many post offices make federal and state income tax forms available during tax preparation season.

Markedly different from Post Office sidewalks, which are open to the public, are such non-public fora as government fund drives, *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1988), utility poles, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 (1984), interschool mail systems, *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), and the curtilage of jail houses, *Adderly v. Florida*, 385 U.S. 39, 47 (1966).

b. Absolute bans are not reasonable regulations.

In its effort to posit a basis for certiorari, Petitioner asserts that the post office "walkways are subject to *congestion*; permitting solicitation at such locations can inconvenience patrons and interfere with the business being conducted in the building itself." Petition at 8 (emphasis added). Again, Judge Wilkinson, writing for the majority in *Kokinda*, recognized that the "First Amendment requires that society tolerate some inconvenience in public forums to protect the values of expression." *Kokinda*, 866 F.2d at 702. This Court has established that

> The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. State*, 299 U.S. 353, 365 [1931], it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is

effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.* For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (emphasis added). Standardization of ideas by the postal service is no less to be feared.

Governmental concerns over congestion are properly dealt with by enacting reasonable time, place and manner restrictions. *Perry Education Association v. Perry Local Educators' Association*, 460 U. S. 37, 45 (1983). Petitioner's absolute prohibition of protected First Amendment activities is not a reasonable time, place and manner restriction.

Sweeping prohibitions of First Amendment activities have consistently been held unconstitutional by this Court. In *Board of Airport Commissioners v. Jews for Jesus,*

482 U.S. 569 (1987), this Court unanimously held that an airport regulation prohibiting all First Amendment activity from taking place in an airport terminal was a "sweeping ban" and could not be justified even in a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech. *See, e.g., Grace*, 461 U.S. at 182-83 (1983) (a total ban of flags, banners or devices on the sidewalk of the Supreme Court building is not justified to preserve decorum).

Similarly, this Court has recognized that "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). The Postal Service can institute "measures less intrusive than a direct prohibition on solicitation" in order to meet its concerns. *Id.* at 637. Petitioner's concerns over traffic congestion and inconvenience are not a sound basis for this Court to grant the Petition for a Writ of Certiorari. The United States Court of Appeals for the Fourth Circuit properly applied this Court's precedents to the facts before it.

2. The postal service regulation is overbroad.

In its Petition for Writ of Certiorari, the government has not raised *unresolved* questions of national importance. In fact, this Court could avoid addressing the public forum question and still affirm the opinion of the

Court below based on the overbreadth doctrine. The prohibition of solicitation of contributions on *all* postal property is substantially overbroad and cannot be tolerated by our system of freedom of expression. *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

In this case, the overbreadth arises from the nature of the Regulation: it imposes a blanket ban. All solicitation is prohibited, even that embodied in merely spoken words or free pamphlets. One postal patron is prohibited from asking another for 25 cents to use a pay phone. No free pamphlets containing membership forms or donation forms may be distributed. Indeed, 39 C.F.R. 232.1(h)(1)(ii) would prevent postal workers from raising money to send flowers and a card saying "GET WELL CHARLIE – OUR POSTAL TEAM NEEDS YOU" to an ailing fellow employee. Moreover, solicitation on all post office sidewalks is prohibited, no matter how spacious, uncongested, and otherwise suitable they may be. Solicitation may occur at no time, at no place and in no manner. The disputed Regulation does not take into account the nuances of individual post offices and it does not permit decisioins to be made as to the capacity of each facility to accommodate solicitation "on an individualized basis, given the particular fact situation." *Grayned v. Rockford*, 408 U.S. 104, 119 (1972). Rather, the Regulation, in classic fashion, "sweeps unnecessarily broadly and thereby invade[s] the area of protected freedoms." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964).

3. The Conflict Among the courts of appeals has not fully matured.

Petitioner asserts that "the conflict among the circuits is as clear-cut as it could be." Petition at 16. Yet, a careful

analysis of the opinions among the circuits indicates that the significant issues have not fully matured. The United States Courts of Appeal for the First, Second, Fifth, Sixth, Eighth, Tenth and D.C. Circuits have not addressed either the constitutionality of the Postal Service Regulation or the public forum status of post office sidewalks. Only the United States Courts of Appeal for the Third and Eleventh Circuits have squarely faced the public forum issue as it relates to the enforcement of the challenged regulation against speech activities on post office sidewalks.

The United States Courts of Appeal for the Third and Eleventh Circuits have held that post office sidewalks were nonpublic forums. *United States v. Bjerke*, 796 F.2d 643 (3d. Cir. 1986); *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986). In his well-reasoned dissent in *Bjerke*, however, Judge Higginbotham noted that the majority failed to explain how a mere architectural separation of two sections of sidewalk by a parking lot could avert First Amendment analysis. *Bjerke*, 796 F.2d at 654-55 (Higginbotham, J., dissenting).

The United States Court of Appeals for the Seventh Circuit, in *National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984), upheld the postal service regulation while avoiding the public forum issue. *National Anti-Drug Coalition* arose when a nonprofit corporation sought to solicit literature on the sidewalk outside a post office. Saying that it would not decide the public forum issue, the Seventh Circuit panel nevertheless held that the Regulation was a valid time, place and manner restriction. A review of the Postal Service's Regulations, however, establishes that "prohibition was preferable to any attempt to permit solicitation under regulation as to time,

place and manner." 43 Fed. Reg. at 38,824. The Postal Service has stated that its Regulation is not a time, place and manner restriction.

In *National Anti-Drug Coalition, Inc.*, Judge Wood dissented strenuously, citing *United States v. Grace*, 461 U.S. at 177, and asserting that the Regulation could not be applied constitutionally to outdoor public sidewalks at post offices such sidewalks are as much a public forum as the public sidewalks around the Supreme Court building.

The law concerning the constitutionality of the Regulation as it relates to postal sidewalks is still emerging. "This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the Court of Appeals." *E.I. du Pont de Nemeurs & Co. v. Trains*, 430 U.S. 112, 135 n.26 (1977). The issues raised in the Government's Petition for Writ of Certiorari have not fully matured and their Petition should be denied.

CONCLUSION

This Court should refuse to grant a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Dated: July 11th, 1989.

Respectfully submitted,

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